Supreme Court, U.S.
FILED

(1)

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In the
Supreme Court of the United States

OCTOBER TERM, 1997

STUART H. SMITH, JR.
Petitioner

VERSUS

UNITED STATES OF AMERICA
Respondent

ON PETITION FOR WRIT OF CERTIORARI FROM THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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26 pp

QUESTIONS PRESENTED FOR REVIEW

I.

The liability of the United States, pursuant to the Federal Tort Claims Act, for damages resulting from conclusions reached by a United States Coast Guard investigating officer included in the Record of Investigation, and the effect of those conclusions as reflected in the plaintiff's Coast Guard record as the holder of a Merchant Marine Officer's License, issued by the Coast Guard, as the Agency responsible for determination of competency and administration of discipline.

II.

The entitlement of the Plaintiff to counsel fees, where the Court found eligibility for counsel fees, but not entitlement when the Coast Guard could give no explanation for a 3-1/2 year delay in production, and then only after filing of suit.

CERTIFICATE OF INTERESTED PARTIES

That the undersigned counsel of record certifies that the following persons or agencies have an interest in the outcome of this case:

STUART H. SMITH, JR.

UNITED STATES OF AMERICA, DEPARTMENT OF TRANSPORTATION,

UNITED STATES COAST GUARD

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STATEMENT OF THE BASIS FOR JURISDICTION

Plaintiff, STUART H. SMITH, JR., brings this Petition For Writ of Certiorari to review the Decision of the United States Court of Appeals for the Fifth Circuit of September 12, 1997.

The jurisdiction of this Court rests in 28 U.S.C. 1254(1)

Statutes Applicable:

5 U.S.C. 552. (Freedom of Information Act)

28 U.S.C. 2674-80 (Federal Tort Claims Act)

Jurisdictional Basis for the United States Court of Appeals for the Fifth Circuit is found in 28 U.S.C. 1291.

STATEMENT OF STATUTES INVOLVED

28 U.S. 2674-80 - Federal Tort Claims Act

"The United States shall be liable, respecting the provisions relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but should not be liable for interest prior to judgment or for punitive damages..."

5 U.S.C. 552(a)(4)(A)-Freedom of Information Act

"...The Court may assess against the United States reasonable attorneys fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed..."

STATEMENT OF THE CASE

On October 3, 1992, STUART H. SMITH, JR. was the holder of a Merchant Marine Officer's License, issued by the United States Coast Guard. SMITH was signed on Coastwise Articles as Third Officer of the SS STONEWALL JACKSON, a steam-powered vessel, documented under the laws of the United States.

On October 3, 1992, SMITH was stationed on the vessel's stern as the STONEWALL JACKSON left its berth in the Port of New Orleans. The mooring lines were let go and tugs assisted the ship into the main course of the river.

For reasons which were never determined, the STONEWALL JACKSON backed into the wharf and damaged the shore structure and her stern. The incident was reported to the local Office of Marine Inspection, and an investigation was conducted by the Coast Guard. On October 4, 1992, SMITH was brought before the Master, and an entry made in the Ship's Offical Log Book indicating his employment was terminated because of his failure to relay accurate information to the Master.

On October 8, 1992, a Freedom of Information Act request was submitted by SMITH for access to the material produced in the investigation. Throughout the early phases of the case, every effort was made by SMITH and his counsel to obtain the record of the investigation, including statements and documents forming the basis for the investigating officer's ultimate conclusions.

On July 16, 1993, SMITH brought a Complaint in the United States District Court for the Eastern District of Louisiana against Waterman Steamship Corporation for wrongful discharge. Waterman answered, citing the Official Coast Guard record, which set forth the Coast Guard report of the incident, and the conclusion that the casualty was the result of SMITH's sole fault, negligence and breach of duty.[1]

On November 30, 1995, the District Court dismissed SMITH's Complaint pursuant to Rule 12(E) of the Federal Rules of Civil Procedure.

SMITH received no response to his request from October, 1992 to June, 1995. On June 19, 1995, SMITH brought suit against the Coast Guard pursuant to the Federal Tort Claims Act and the Freedom of Information Act. The Court dismissed the Federal Tort Claims Act on October 11, 1995, but reserved the Freedom of Information Act Claim.

On December 4, 1996, the District Court found that the Coast Guard had not complied with the statute requiring the production of information, but denied recovery of counsel fees.

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[1] In an effort to obtain the material relied on by the investigating officer in support of his conclusion, counsel for SMITH noticed the deposition of the investigating officer and the Commander, Eighth Coast Guard District, and caused subpoenas to be issued. The witnesses did not respond to the subpoenas, and counsel for SMITH brought a Motion to Hold the Officers in Contempt, or In the Alternative, to Permit the Taking of Their Oral Depositions. The Contempt Motion was not heard by the Court.

ARGUMENT

I.

THE DISTRICT COURT WAS IN ERROR IN DISMISSING THE COMPLAINT PURSUANT TO RULE 12(E) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

The District Court dismissed Plaintiff's Complaint under the Federal Tort Claims Act[2] on the ground that the claim was for defamation excluded under the Act.

As a general rule, a Complaint must set forth facts which constitute a cause of action, and is not subject to dismissal unless it appears that the Plaintiff is not entitled to relief under any set of facts which could prove his allegations.[3]

Even then, the court should not dismiss the Complaint except after offering the Plaintiff every opportunity to state a claim upon which relief can be granted. Dismissal is justified only if it appears beyond doubt that no set of facts can support the Plaintiff's claim for relief.

Plaintiff has alleged a cause of action consistent with 28 U.S.C. 2674 which provides:

"The United States shall be liable, respecting the provisions relating to tort claims, in the same manner and

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[2] 28 U.S.C. 2680(h)

[3] *Rodriguez v. U.S.*, 66 F.3d 95 (CA 5-1995); *Budger v. Bureau of Prisons*, 65 F.3d. 48 (CA 5-1995); *Matter of U.S. Abatement Corp.*, 39 F.3d. 556 (CA 5-1994).

> to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to Judgment or for punitive damages..."

STUART SMITH alleged negligence on the part of the Coast Guard in the conduct of the investigation of a marine casualty. Negligence is not one of the exceptions to liability available to the United States under the Act.[4]

In the reasons for dismissing SMITH's claim, the Court cited *Bosco v. U.S. Army Corp. of Engineers*:[5]

> "It is from such allegation that the gravamen of Plaintiff's complaint is injury to his reputation which is the interest protected by the defamation.."

Defamation is not specifically included among the exceptions in 28 U.S.C. 2680(h), and is not a separate or distinct tort, but rather an inclusive term, to include libel and slander, and employs communication of information by one party to another, either in writing or orally.[6]

In this case, it is not suggested that the Coast Guard, or the Coast Guard personnel intentionally sought to damage the Plaintiff's reputation. Nor is it suggested that the contents of the report were purposely, deliberately, or maliciously published or communicated to third parties. In fact, it is not suggested that the information went to anyone outside the

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[4] 28 U.S.C. 2680(h)

[5] 611 F.S. 449, 453 (ND - Texas, 1985).

[6] Restatement of Law of Torts, 2d § 558.

Coast Guard. The Coast Guard has the statutory responsibility for maintaining and enforcing professional standards for licensing and certification of Merchant Marine officers. Implicit in that responsibility is a commensurate degree of care in carrying out its function relating to discipline and qualification of licensed officers.

The Coast Guard is required by statute to prescribe regulations for the investigation of marine casualties to determine their cause, whether by an act of misconduct, incompetence, negligence, or unskillfulness; whether there has been a violation of rules and regulations by any individual holding a Coast Guard license or certificate; or whether an act of misconduct, incompetence, negligence, unskillfulness, or a willful violation of law contributed to the casualty.[7] If an investigation is conducted, the holder of a license or certificate or registry is entitled to representation by counsel to cross-examine witnesses and to call witnesses on his own behalf.[8] As the licensing agency of the United States[9] for merchant marine officers, license and certificates are issued by the Coast Guard contingent upon a determination that the applicant demonstrates proficiency, that he (or she) has the "requisite general knowledge and skill to hold a license" and he (or she) maintains an adequate knowledge of the waters to be navigated and knowledge of regulations for the prevention of collision in those waters, and meets other requirements considered reasonable and necessary.

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[7] 46 U.S.C. §6301.

[8] SMITH was not designated a part of the investigation. He was not permitted to cross-examine witnesses or to compel the attendance of witnesses at a hearing.

[9] 46 U.S.C. §7101.

In this instance, investigating officer attributed the collision to improper or inaccurate estimates of distance given by the Plaintiff. Those conclusions did not have to be communicated to third persons to cause damage to SMITH's professional status; they immediately became part of the official record maintained by the Coast Guard and to be considered in actions dealing with renewal or issuance of merchant marine officer licenses or pilotage endorsements. Once the report with the erroneous conclusions became part of the record, the damage had been done. Citing *Kugel v. United States,* [10] the Court suggested that the dissemination of information assorted with the investigation is what caused damage to the Plaintiff. The damage sustained by the Plaintiff was the fact that the product of a less than thorough investigation became part of his official Coast Guard record where it will remain. It is SMITH's contention that the Coast Guard investigation, as an operational function, was flawed and that the investigating officer overlooked or was unaware of several problems involving the ship's main propulsion system which, if disclosed, could have exonerated him from any responsibility for the allision. There is no indication that this area of inquiry was ever considered by the investigating officer.

As the agency responsible for qualification and licensing of merchant marine officers, Coast Guard maintained the record of the investigation, as well as personnel records which may well result in the denial or loss of a license by that agency to Mr. SMITH.

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[10] 947 F.2d. 1504, 1507 (DC Cir. 1991).

II.

PLAINTIFF'S ENTITLEMENT TO COUNSEL FEES UNDER THE FREEDOM OF INFORMATION ACT.

The District Court entered Judgment in favor of SMITH and against the United States finding that he was eligible for an award of attorneys fees, but was not entitled to them. It is suggested that SMITH is entitled to counsel fees by reason of failure of the Coast Guard to initiate a search for the records requested for almost three (3) years after the initial request was made.[11]

The Court found that SMITH was required to bring the suit against the Coast Guard to obtain the requested information, and which had been withheld from him from October, 1992 until May, 1996. In fact, in June, 1993, the Coast Guard terminated all efforts to process SMITH's request without any notification to him. In the absence of litigation, the document still would have been produced. SMITH's Freedom of Information Act suit was the principal cause of the Coast Guard's eventual compliance in May, 1996. For these reasons, the Court determined that SMITH was eligible for counsel fees.

The District Court found that SMITH had prevailed in his objective of acquiring documents which were the subject of his request, and was eligible for an award. The Court however found that SMITH had not shown entitlement to an award, and an award of counsel fees would neither benefit the public or serve as a deterrent to agency obduracy.

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[11] 5 U.S.C. 552(a)(4)(A). The Act provides that: "The Court may assess against the United States for reasonable attoreny's fees and other litigation costs reasonably incurred in any case under this section in which the Complainant had substantially prevailed...".

The Court found that:

> "...The evidence in this case is that the Coast Guard's noncompliance was due to administrative ineptitude rather than any unwillingness to comply with SMITH's Freedom of Information Act Request...".

The District Court found that the Coast Guard offered no explanation for it "gross non-compliance with Freedom of Information Act. .". If such administrative and bureaucratic ineptitude is responsible for a three and one half year delay in responding to the requests for information, then such ineptitude should be exposed to public scrutiny.

The line between administrative ineptitude, gross negligence, and bad faith becomes very fine indeed, particularly in view of the Coast Guard's abandonment of efforts to make the records available in July, 1993 without advising SMITH of its action.

The original intent of the Act was to create a policy of broad disclosure of information. As originally enacted, there was no provision for attorney's fees. The Act was subsequently amended to provide attorney's fees for substantially prevailing plaintiffs.[12]

Courts in some circuits have allowed interim awards of attorney's fees to prevailing parties before cases have been concluded.[13]

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[12] *Powell v. U.S. Department of Justice*, 569 F.S. 1192 (ND CAL - 1983).

[13] *Powell v. U.S. Department of Justice*, supra; *Baldridge v. Shapiro*, 455 U.S. 45 (1982).

Congress enacted the provision in the Act to insure citizens access to courts to vindicate their statutory rights and to remove the incentive for administrative resistance to disclosure of information based on the knowledge that many individual plaintiffs do not have the financial resources or economic incentives to pursue the requests through litigation.[14]

The action (or inaction) of the Coast Guard in this case illustrates the purpose of the Act — to discourage government foot dragging in response to a request under the Act to produce information not covered in any of the statutes exceptions.

Bureaucratic inaptitude is not far removed from bad faith or obduracy in considering a response to a request.

Respectfully,

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[14] *Nationwide Building Materials v. Saipem*, 559 F.2d 704; 710-13.

CERTIFICATE

This is to certify that copies of the Petition For Writ of Certiorari have been served by United States mail, first class, postage prepaid, on The Solicitor General of the United States, Room 5614, Department of Justice, 10th and Constitution Avenue, N.W., Washington, DC 20530, this 11th day of December, 1997.

RALPH E. SMITH

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Filed Oct 6, 95

STUART H. SMITH, JR.	CIVIL ACTION
VERSUS	NO. 95-1950
UNITED STATES OF AMERICA	SECTION "I" (1)

ORDER AND REASONS

Before the Court is the United States' motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. Having reviewed the motion, the memoranda of the parties, the record, and the law, the Court grants the motion.

Background

In October, 1992, Plaintiff Smith was employed as the third mate aboard the SS STONEWALL JACKSON. At that time, the SS STONEWALL JACKSON was docked at the Pauline Street Wharf in New Orleans and was preparing to head to sea. Smith was assigned to the stern of the ship and was directed to report to the bridge the distances between the stern of the vessel and the wharf as the vessel pulled away from the Pauline Street Wharf. During this maneuver, the stern of the vessel hit the wharf. The United States Coast Guard investigated the incident, and determined that Smith

had given incorrect information to the bridge, which resulted in the allision. Smith was terminated the next day for failing to properly carry out his assigned duties.

In July, 1993, Smith filed a complaint for wrongful discharge.[1] This Court granted summary judgment in favor of the employer, finding that Smith was not wrongfully discharged.[2] Smith has now filed suit against the United Stated under the Federal Tort Claims Act contending that the Coast Guard conducted its investigation in a negligent fashion, the results of which caused damage to the plaintiff. Smith further contends that he has been damaged by the Coast Guard's denying him access to its records of the investigation and supporting documents.

The United States has moved to dismiss Smith's first cause of action, maintaining that Smith's petition contains a claim arising out of the intentional tort of defamation. The question now before the Court is whether Smith's claim falls into the intentional torts exception to the Federal Tort Claims Act.

Law and Analysis

When a defendant challenges the subject matter jurisdiction of a court, the burden is on the plaintiff to prove that jurisdiction exists. *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507 (5th Cir. 1980). Smith argues that his cause

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[1] See *Stewart H. Smith, Jr. v. Waterman Steamship Corporation, et al*, civil action no. 93-2307, Section "I".

[2] See Order and Reasons entered January 6, 1994.

of action is one for negligence, and is properly brought under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671, et seq. However, if the tort alleged in a FTCA case falls within one of the exceptions in §2680, then the district court lacks subject matter jurisdiction. *Morris v. United States,* 521 F.2d 872 (9th Cir. 1975).

When construing the FTCA, the Court must be mindful of the general principle that the United States may be liable for the torts of its employees only where there has been a "clear relinquishment of sovereign immunity." *Dalehite v. United States,* 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953). The FTCA provides an exception from the waiver of soverign immunity for intentional torts wherein it states that:

> The provisions of this chapter [28 USCS §§ 2671 et seq.] and section 1346(b) of this title shall not apply to—
>
> > (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights...

28 U.S.C. §2680(h).

The Supreme Court's recent statement on this issue is that "the proper objective of a court attempting to construe one of the subsections of 2680 is to identify 'those circumstances which are within the words and reason of the exception'—no less and no more." *Kosak v. United States,* 465 U.S. 848, 104 S.Ct. 1519, 79 L.Ed.2d 860 (1984), quoting *Dalehite,* 346 U.S. at 31, 73 S.Ct. at 965). The Court must

look not only to the theory upon which the plaintiff elects to proceed, but rather to the substance of the claim which he asserts. *Lambertson v. United States,* 528 F.2d 441 (2d Cir. 1976).

In the instant case, Smith claims that as a result of the negligent performance and dereliction of duty of the investigating officer, and erroneous facts as set forth in the report of investigation, he has sustained loss of employment opportunities because of the blemish on his record, and continues to suffer reduced employment opportunities. Complaint, ¶ 14. It is clear to this Court that the gravamen of Smith's complaint is injury to reputation which is the interest protected by the law of defamation. The Court is mindful that the list of torts in 2680(h) is not exhaustive, *see Birnbaum v. United States,* 436 F.Supp. 967 (E.D.N.Y. 1977), and that defamation also fits into the exclusion. *See Bosco v. United States Army Corps of Engineers,* 611 F.Supp. 449 (D.C.Tex. 1985); *Art Metal-U.S.A., Inc. v. United States,* 753 F.2d 1151 (D.C. Cir. 1985); and *Kugel v. United States,* 947 F.2d 1504 (D.C. Cir. 1991).

In *Kugel,* the court was faced with a very similar situation where the plaintiff claimed that the negligent execution of an investigation by the FBI resulted in his losing contracts and being humiliated. The plaintiff tried to sue under the FTCA for negligent conduct of an investigation. The *Kugel* court held that the allegations that the FBI negligently executed its investigation arose out of defamation, an intentional tort, and could not support a claim under the FTCA.

This Court finds *Kugel* to be exactly on point, and concludes that the cause of Smith's injury was not the Coast

Guard's execution of the investigation, but its dissemination of the information associated with the investigation. The Court therefore finds that Smith's claim arises from alleged defamation by the Coast Guard which is excluded from the FTCA.

The Court will not permit the obvious attempt by Smith to circumvent the §2680(h) exception by merely relabeling the theory under which he seeks recovery. A litigant may not simply substitute the name of a cause of action which is not included in § 2680 for one that is included where the alleged breach of duties in the two claims are identical. *Art Metal-U.S.A. v. United States,* 753 F.2d 1151 (D.C. Cir. 1985). The substance of Smith's complaint here clearly is an intentional tort which is barred under the FTCA.

Considering the conclusion reached above, the Court need not address the United States' contention that this suit is in admiralty and has prescribed.

Accordingly,

IT IS ORDERED that defendant's motion to dismiss plaintiff's first cause of action for lack of subject matter jurisdiction is **GRANTED.**

New Orleans, Louisiana this 5th day of October, 1995.

/s/ Harry A. Mentz, Jr.
UNITED STATES DISTRICT JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Filed Oct 11, 95

STUART H. SMITH, JR.	CIVIL ACTION
VERSUS	NO. 95-1950
UNITED STATES OF AMERICA	SECTION "I" (1)

J U D G M E N T

Considering the court's Order and Reasons dated October 5, 1995, and further considering the court's direction as to entry of judgment;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendant, United States of America, and against plaintiff, Stuart H. Smith, Jr., dismissing plaintiff's complaint at his cost.

New Orleans, Louisiana, this 11th day of October, 1995.

/s/ Harry A. Mentz, Jr.
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Filed Nov 1, 95

STUART H. SMITH, JR.	CIVIL ACTION
VERSUS	NO. 95-1950
UNITED STATES OF AMERICA	SECTION "I" (1)

ORDER AND REASONS

Before the Court is a motion for reconsideration filed by Plaintiff Smith and a memorandum in opposition by Defendant United States of America. There being no need for oral argument, the matter is taken on the briefs.

Plaintiff asks this Court to reconsider its ruling granting Defendant's motion to dismiss first cause of action. In that ruling, the Court found that the actions alleged by Plaintiff in his complaint arose from an intentional tort which is excluded from the Federal Tort Claims Act. After considering the pleadings of the parties, the Court denies the motion for reconsideration.

LAW AND ANALYSIS

Although the Federal Rules of Civil Procedure do not particularly recognize the "motion for reconsideration", district courts will often accept such motions as being in the

interest of substantial justice. *See* F.R.C.P. 8(f). However, a motion to reconsider based on recycled arguments only serves to waste the resources of the court. *State of Louisiana v. Sprint Communications Co.*, 1995 WL 539233 (M.D.La. 1995). Therefore, rulings should only be reconsidered where the moving party has presented substantial reasons for reconsideration. *Id.* A motion for reconsideration should not give the losing party opportunity to simply reargue his losing points and authorities. *Shields v. Shetler*, 120 F.R.D. 123 (D.Co. 1988).

Considering the above standard, the Court must deny Plaintiff's motion. Plaintiff has advanced no new theories or authorities which the Court did not consider in the first instance.

Finally, the Court need not amend the judgment to preserve Plaintiff's claims pursuant to the Freedom of Information Act, as only the claims relating to intentional torts under the Federal Tort Claims Act were dismissed.

Accordingly,

IT IS ORDERED that Plaintiff's motion for rehearing or to amend order is **DENIED.**

New Orleans, Louisiana this 14th day of November, 1995.

/s/ Harry A. Mentz, Jr.
UNITED STATES DISTRICT JUDGE